

**United States Government  
National Labor Relations Board  
OFFICE OF THE GENERAL COUNSEL**

## Advice Memorandum

DATE: April 1, 2004

TO : Wayne Gold, Regional Director  
Region 5

FROM : Barry J. Kearney, Associate General Counsel  
Division of Advice

SUBJECT: UNITE  
Cases 5-CC-1278, 1279, 1280, 1281, 1283

560-2575-6767  
560-2575-6767-2500  
560-7540-8040-3375

The Region submitted these 8(b)(4)(ii)(B) cases for advice as to 1) whether the Union's use of puppets and street theater should be added to the Region's existing complaint that alleges that the Union engaged in unlawfully confrontational conduct, including the use of banners, against neutral businesses for whom the Employer provides laundry and dry cleaning services; 2) whether the Union's picketing of the Churchill Hotel urging guests not to use the Employer's dry cleaning service at the Hotel was unlawful; and (3) [FOIA Exemption 5

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We conclude that the Union's use of puppets and street theater at the Churchill Hotel and Tabard Inn should not be added to and alleged separately in the Region's pending 8(b)(4)(ii)(B) complaint. We further conclude that the Union's picketing at the Churchill Hotel urging guests not to use the Employer's dry cleaning service was not unlawful. Accordingly, the charges in Cases 5-CC-1281 and -1283 should be dismissed, absent withdrawal. [FOIA Exemption 5

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### FACTS

UNITE (the Union) is involved in a campaign to organize employees at Sterling Laundry (Sterling or the Employer). The Union went on strike against Sterling on September 8.<sup>1</sup> Beginning September 11, the Union began

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<sup>1</sup> Herein all dates are 2003 unless otherwise indicated.

picketing activities at businesses with which Sterling had contracts to perform laundry and/or drycleaning services including Sibley Memorial Hospital, Woodbine Nursing Home, the Churchill Hotel, and the Tabard Inn.<sup>2</sup> The Region concluded that the Union's conduct at these sites between about September 11 and November 11, violated Section 8(b)(4)(ii)(B). The specifics of the conduct at the Churchill Hotel and the Tabard Inn, including the incidents submitted for advice, are set out below.<sup>3</sup>

### Churchill Hotel

UNITE began picketing activities at the Churchill Hotel on about September 11. The activities occurred twice a day, and lasted for about 20 to 30 minutes. Between 15 and 30 people stationed themselves in a little park area on the sidewalk directly across the street from the Hotel. Some held circular "UNITE" picket signs. The group displayed three banners, made from queen-sized white sheets, with red, black and blue writing. One banner stated: "Warning! The Linen at the Churchill May be Unsanitary!" Two banners stated: "Shame on Churchill."

The pickets chanted "Shame on Churchill" and "What do we want? Justice. When do we want it? Now!" They also used bullhorns and noisemakers such as drums and sirens. Sometimes the group moved to the sidewalk directly in front of the Hotel entrance, walked in a circle, and then returned to their spot across the street. Some individuals also occasionally handed out flyers to guests and passersby at the sidewalk in front of the Hotel. The flyers stated: "Warning! The Sheets and other Linens at the Churchill May be Improperly Laundered or Sterilized!"

On about October 20, the group stopped using noisemakers, dropped to two banners, and added "street theater" and two "puppets" to the group of pickets across

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<sup>2</sup> The Union filed a representation petition on October 6. The petition is "blocked" pending resolution of the instant and other charges.

<sup>3</sup> The merits of the allegations against Sibley and Woodbine have not been submitted for advice. The unlawful conduct at Sibley included picketing with "UNITE" signs and queen-sized banners warning that Sibley's linen might be unsanitary; demonstrating and parading with drums, noisemakers, and bullhorns; and distributing handbills. The unlawful conduct at Woodbine included picketing with signs stating: "ULP Strike."

the street from the Hotel. The puppets were each about 15 feet high and held up by a stick. One puppet portrayed a white male wearing a black suit and a top hat. Across its body were the words, "Skip Jacobsen. Owner of Sweatshop Laundry." Its top hat had a dollar sign, and its pant legs stated "Sterling on Strike." The other puppet portrayed an African-American woman in a long, reddish-pink dress. The puppet-holders occasionally leaned their sticks over to each other, and engaged the puppets in a mock "fight."

The "street theater" consisted of women holding clothes irons and wearing fake chains. The women acted out ironing in the chains to simulate a sweatshop. They did not say anything separately, but participated in the group chants. On about November 13, the Union ceased all the above activities, including the puppets and street theater.

Beginning about November 24, about five or six individuals wearing "sandwich boards" began passing out handbills to hotel guests on the public sidewalk in front of the two entrances to the Hotel. The individuals came twice a day, from about 10:00 to 11:30 a.m., and from 1:30 to 3:00 p.m. The black and white sandwich boards stated:

Hotel Guests: Boycott Sterling Cleaners. Don't use Sterling Dry Cleaning Service at this Hotel. No dispute with any hotel; this message is addressed exclusively to the public and is not an appeal to employees to refuse to perform services or to deliver goods.

The handbills stated in pertinent part:

Thinking of using your hotel's Dry-Cleaning Service? You might want to think again: This hotel sends guests' drycleaning to Sterling Cleaners. Sterling workers are on strike, and the company has replaced them with inexperienced strikebreakers. . . . We do not intend for anyone to boycott any hotel, to stop work or to stop making pick-ups or deliveries. We intend only to seek public support for UNITE'S strike against Sterling Cleaners because of its unfair labor practices.

#### Tabard Inn

About twice in September, UNITE picketed the Tabard Inn. Between 15 and 30 people held UNITE picket signs and two queen-sized sheet banners stating "Shame on Tabard Inn," used noisemakers, and passed out handbills. On November 2, the Union added to these activities the same

"puppets" and "street theater" that it used at the Churchill Hotel, described above.

The Region's Consolidated Complaint, the new unfair labor practice charges, the Union's settlement proposal

On December 31, the Region issued a consolidated complaint in Cases 5-CC-1278, -1279, and -1280, alleging that the Union violated Section 8(b)(4)(ii)(B) by picketing Sibley Memorial Hospital, the Churchill Hotel, The Tabard Inn, and Woodbine Nursing Home to force them to cease doing business with Sterling Laundry, and to force Sterling Laundry to recognize the Union. The allegations pertaining to the Union's activities at the Churchill Hotel included, in pertinent part, that between about October 20 and November 11, the Union demonstrated, paraded, chanted, picketed with signs stating 'UNITE,' and displayed queen-sized sheet banners stating that the linen at Churchill may be unsanitary. The complaint did not specifically allege the Union's use of puppets or street theater.

The allegations pertaining to the Union's activities at the Tabard Inn provided, in pertinent part, that between September and November 2, the Union picketed, displayed queen-sized sheet banners stating "Shame on Tabard Inn," demonstrated, paraded, chanted, beat drums, blew whistles, shook cans filled with coins, used sirens, used tambourines, and used a bullhorn. The complaint did not specifically allege the Union's use of puppets or street theater.

On December 8, Sterling filed a new charge alleging that beginning November 22 (the approximate date on which the Union began picketing and handbilling Hotel customers to boycott Sterling's dry cleaning services) the Union violated Section 8(b)(4)(ii)(B) by resuming picketing at the Churchill Hotel.<sup>4</sup> On January 14, 2004, Sterling filed a charge alleging that the Union's use of puppets and street theater, in conjunction with other unlawful picketing, violated Section 8(b)(4)(ii)(B).<sup>5</sup>

The Union has proposed to partially settle the allegations of unlawful conduct set out in the Region's outstanding complaint. The Union proposes a settlement, agreeing to cease all of the conduct alleged in the outstanding complaint except for its use of banners; it proposes to litigate separately the issue of whether its use

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<sup>4</sup> 5-CC-1281.

<sup>5</sup> 5-CC-1283.

of banners violated Section 8(b)(4)(ii)(B). [FOIA  
Exemption 5  
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### ACTION

We conclude that the Union's use of puppets and street theater at the Churchill Hotel and Tabard Inn should not be added to and alleged separately in the Region's pending 8(b)(4)(ii)(B) complaint; accordingly, Case 5-CC-1283 should be dismissed, absent withdrawal. We further conclude that the Union's picketing at the Churchill Hotel urging guests not to use the Employer's dry cleaning service was not unlawful; accordingly, Case 5-CC-1281 should be dismissed, absent withdrawal. [FOIA Exemption 5

] if settlement is not reached, litigate all conduct alleged now as violative of Section 8(b)(4)(ii)(B).

### Puppets and street theater

Section 8(b)(4) proscribes picketing and "all [union] conduct . . . inten[ded] to coerce, threaten, or restrain third parties to cease doing business with a neutral employer . . ."<sup>6</sup> Mere persuasion of customers not to patronize neutral establishments does not, in and of itself, coerce the establishments within the meaning of Section 8(b)(4)(ii)(B). On the contrary, in DeBartolo II<sup>7</sup> the Supreme Court concluded that a union's peaceful distribution of area standards handbills urging a consumer boycott of neutral employers did not constitute "restraint or coercion" under Section 8(b)(4)(ii)(B). The Court noted that there would be serious doubts about whether Section 8(b)(4) could constitutionally ban peaceful handbilling not involving non-speech elements.<sup>8</sup> Thus, because of First Amendment considerations, the Court interpreted the phrase

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<sup>6</sup> Teamsters Local 122 (August A. Busch & Co.), 334 NLRB 1190, 1204 (2001) (citations omitted). See also Service Employees Local 87 (Trinity Maintenance), 312 NLRB 715, 743 (1993), enfd. mem. 103 F.3d 139 (9th Cir. 1996) (citations omitted).

<sup>7</sup> Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Trades Council, 485 U.S. 568 (1988).

<sup>8</sup> 485 U.S. at 574-577.

"threaten, coerce, or restrain" with caution, and not with a broad sweep to exclude non-picketing activities partaking of free speech.<sup>9</sup>

The First Amendment, however, does not protect confrontational conduct such as picketing. Picketing involves a mixture of conduct and communication, and does not depend solely upon the persuasive force of the idea being conveyed, but rather on the conduct element, which "often provides the most persuasive deterrent to third persons about to enter a business establishment."<sup>10</sup> In determining whether employees are engaged in lawful DeBartolo II handbilling or in unlawful "picketing," the Board considers whether, under the totality of the circumstances, a union is using conduct, rather than speech, to induce a sympathetic response.

The presence of traditional picket signs and/or patrolling is not a prerequisite for finding that a union's conduct is the equivalent of traditional picketing.<sup>11</sup> Rather, "[o]ne of the necessary conditions of 'picketing' is a confrontation in some form between union members and employees, customers, or suppliers who are trying to enter the employer's premises."<sup>12</sup> Patrolling/ picketing thus provokes people to respond without inquiring into the ideas being disseminated and thereby distinguishes picketing from handbilling and other forms of communication.

For example, because of its confrontational and coercive nature, mass activity involving crowds that far exceed the number of people necessary for solely free speech activity may constitute picketing,<sup>13</sup> and even signs

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<sup>9</sup> Id. at 578.

<sup>10</sup> See DeBartolo II, above, 485 U.S. at 580, quoting NLRB v. Retail Store Employees Union, Local 1001 (Safeco) 447 U.S. 607, 619 (1980) (Stevens, J., concurring).

<sup>11</sup> See, e.g., Lawrence Typographical Union No. 570 (Kansas Color Press), 169 NLRB 279, 283 (1968), enfd. 402 F.2d 452 (10th Cir. 1968), citing Lumber & Sawmill Workers Local No. 2797 (Stoltze Land & Lumber Co.), 156 NLRB 388, 394 (1965).

<sup>12</sup> Chicago Typographical Union No. 16 (Alden Press), 151 NLRB 1666, 1669 (1965), quoting NLRB v. United Furniture Workers, 337 F.2d 936, 940 (2d Cir. 1964).

<sup>13</sup> See, e.g., Mine Workers (New Beckley Mining), 304 NLRB 71, 71, 72 (1991), enfd. 977 F.2d 1470 (D.C. Cir. 1992) (finding mass picketing in violation of 8(b)(4)(ii)(B))

placed in proximity to an entrance may be considered tantamount to picketing under certain circumstances.<sup>14</sup> A union's use of a large, inflated rat has also been viewed as confrontational because a rat is a well-known symbol of a labor dispute and could constitute a signal to third persons that there is an invisible picket line they should not cross.<sup>15</sup> At the same time, the use of large, attention-getting devices that did not serve as well-known symbols of a labor dispute have not been deemed unlawful. Thus, displays of large, inflatable skunks and Uncle Sam balloons were not relied upon to conclude that a union's activity was

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where 50-140 union supporters milled about in parking lot outside neutral facility around 4:00 a.m. while shouting antagonistic speech to replacement employees); Service & Maintenance Employees Union No. 399 (William J. Burns Int'l Detective Agency), 136 NLRB 431, 432, 436 (1962) ("[t]hat such physical restraint and harassment must have been intended may be inferred from the number [20-70] of marchers engaged in patrolling (far more than required for handbilling or publicity purposes)").

<sup>14</sup> See, e.g., Teamsters Local 182 (Woodward Motors), 135 NLRB 851, 851 n.1, 857 (1962), enfd. 314 F.2d 53 (2d Cir. 1963) (finding picketing that violated Section 8(b)(7)(B) where the union stuck two picket signs, which union agents monitored from a nearby car, in a snowbank in front of the employer's facility after the union had engaged in three months of traditional picketing at the facility).

<sup>15</sup> The deployment of a large, inflated rat, a well-known symbol of labor unrest, has contributed to a finding of picketing in a number of cases. See San Antonio Community Hospital v. Southern California District Council of Carpenters, 125 F.3d 1230, 1236 (9<sup>th</sup> Cir. 1997) (noting that one of definitions of "rat" is employer who fails to pay prevailing wages); see also Local 78, Asbestos, Lead and Hazardous Waste Laborers (Hampshire House), Case 2-CC-2581, Advice Memorandum dated June 25, 2003 (display of large, inflatable rat, along with other activity, contributed to finding of picketing); Laborers (Pavarini Construction Co.), Case 12-CC-1262, Advice Memorandum dated April 25, 2003 (same); Sheet Metal Workers, Local 15 (Brandon Regional Hospital), Case 12-CC-1258, Advice Memorandum dated April 4, 2003 (same); Local 79, LIUNA (Renam Development, LLC), Cases 2-CC-2559-1 et. al., Appeals Minute dated April 13, 2003 (same); Local 79, LIUNA (Calleo Development Corp.), Cases 2-CC-2546, et al., Appeals Minute dated January 24, 2003 (same).

picketing because they did not serve as signals of invisible picket lines.<sup>16</sup>

Here, the Region has determined that at different dates during September and November at the Churchill Hotel and the Tabard Inn, the Union engaged in a number of activities that, in their entirety, amounted to confrontational conduct in violation of Section 8(b)(4)(ii)(B). The Region's complaint lists specific examples of unlawful conduct, including demonstrations by union supporters carrying UNITE picket signs and queen-sized sheet banners, parading, chanting, the use of loud noisemakers and bullhorns, and entering the hotel facility.

We conclude that the Union's use of puppets and street theater, which occurred in conjunction with the above-mentioned activities, should not be added to the complaint as separate indicia of confrontational conduct. Puppets and street theater, unlike rats, have no historical significance in the labor movement. Thus, they are more akin to the use of skunk or Uncle Sam balloons, whose displays merely serve generally to draw attention to the Union's activities. Indeed, the Union's puppet and street theater activities here are attempts to dramatize employees' view of their treatment by the Employer, thus communicating a message to the public about the nature of the Union's dispute. As such, they are lawful attention-getting devices designed to visually disseminate ideas to passersby, and to provoke onlookers to inquire further, rather than conduct intended to confront customers or others.

Moreover, to the extent that the individuals involved in the puppet and street theater activity participated in creating the coercive atmosphere by joining in the group's confrontational activities (such as chanting), that conduct is already included in the existing complaint. Accordingly, the Region should not separately allege the puppetry and street theater as independent violations of Section 8(b)(4)(ii)(B), and the charge in Case 5-CC-1283 should be dismissed, absent withdrawal.

Picketing urging hotel guests not to use the Employer's dry cleaning service

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<sup>16</sup> See Construction and General Building Laborers, Local 79 (C&D Restoration, Inc.), Case 2-CP-1036-1, Advice Memorandum dated August 15, 2003; Bricklayers Local 1 (Yates Restoration Group, Ltd.), Case 2-CD-1082-1, Advice Memorandum dated January 12, 2004.



Section 8(b)(4)(ii)(B) does not prohibit picketing to persuade customers of a neutral employer not to buy the products of a primary employer.<sup>17</sup> As the Supreme Court explained, "[w]hen consumer picketing is employed only to persuade customers not to buy the struck product, the union's appeal is closely confined to the primary dispute." Although the site of the appeal is expanded to include the premises of the secondary employer, the secondary employer's purchases from the struck firms are decreased only because the public has diminished its purchases of the struck product.<sup>18</sup> In Tree Fruits, for example, the Court held that a union striking certain Washington fruit packers lawfully picketed large supermarkets in order to persuade consumers not to buy the fruit packers' apples. The Court noted that the apples were but one item among many that made up the retailer's trade, and if the union's activity was successful, it simply would have induced the neutral retailer to reduce its orders for the product or to drop the item as a poor seller. Thus, the marginal injury to the neutral retailer was purely incidental to the lawful primary product boycott.<sup>19</sup>

By contrast, when consumer picketing is employed to persuade customers not to trade at all with the secondary employer, the latter stops buying the struck product, not because of a falling demand, but in response to pressure designed to inflict injury on the secondary business generally. In such cases, the union does more than merely follow the struck product; it creates a separate dispute with the secondary employer.<sup>20</sup> In American Bread Company,<sup>21</sup> for example, the Board found that a union seeking to represent employees of a bread company unlawfully picketed two restaurants asking customers not to use the bread

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<sup>17</sup> NLRB v. Fruit Packers, Local 760 (Tree Fruits), 377 U.S. 58 (1964).

<sup>18</sup> *Id.* at 72.

<sup>19</sup> 447 U.S. at 613. See also Kansas City Royals Baseball Club, Case 17-CC-1134, Advice Memorandum dated September 17, 1993 (picketing to persuade customers of baseball team, the neutral, not to buy products of the baseball player's concessionaire, the primary, was not unlawful where the signs and handbills asked customers to refrain from buying the concessions and not to boycott the game).

<sup>20</sup> Tree Fruits, 377 U.S. at 72.

<sup>21</sup> 170 NLRB 91 (1968), *enfd.* 411 F.2d 147 (6<sup>th</sup> Cir. 1969).

company's products, which were in the restaurants' sandwiches, toast, and cooking. In enforcing the Board's order, the Sixth Circuit noted that the bread company's output was integrated into the restaurant's meals and could not readily be recognized by the customers as to particular brand; in order for restaurant customers to express sympathy for the union, they would have had to refrain from ordering any meals served with bread or bakery products. Thus, the union's picketing of the restaurants entailed practically a boycott on all meals served in the secondary establishment.<sup>22</sup>

In the instant case, we agree with the Region that the Union's picketing was lawful because it merely sought to persuade hotel guests not to use Sterling's dry cleaning services, and thus was closely confined to the primary dispute. The handbills and the sandwich boards specifically identify Sterling as the primary employer and request that Hotel guests refrain from using only that service because it is performed by Sterling. The handbills also specifically state that the Union does "not intend for anyone to boycott any hotel, to stop work or to stop making pick-ups or deliveries."

Further, a hotel dry cleaning service is only a marginal aspect of the hotel's business, and is not so integrated into the hotel's basic function as to have the effect of a boycott of the hotel. Thus, even if the Union here succeeded in persuading guests to boycott the drycleaning service, it would not have threatened the hotel's operation.<sup>23</sup> Finally, the picketers acted

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<sup>22</sup> Id. at 154. See also Safeco, above, 447 U.S. 607 (picketing unlawful where title insurance companies, which were picketed by union representing employee of title insurance underwriter, derived over 90% of the gross income from sale of underwriter's policies and successful secondary picketing thus put the title companies to a choice between their survival and severance of their ties with the underwriter); Hoffman ex rel. NLRB v. Cement Masons Local 337, 468 F.2d 1187, 1192 (9<sup>th</sup> Cir. 1972), cert. denied, 411 U.S. 986 (union embroiled in a primary dispute with a general contractor unlawfully picketed a real estate developer's housing subdivision to persuade prospective purchasers not to buy the houses because they were constructed by the contractor. The purchasers "could reasonably expect that they were being asked not to transact any business whatsoever" with the neutral developer).

<sup>23</sup> Such a situation could occur if the Union were seeking to persuade guests not to use Sterling's laundry services, since that would involve a boycott of items such as sheets

peacefully and did not engage in any confrontational or coercive conduct.<sup>24</sup>

[FOIA Exemption 5

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Accordingly, the charges alleging that the Union violated Section 8(b)(4)(ii)(B) in Cases 5-CC-1281 and 1283 by using puppets and street theater, and by picketing to urge Churchill's guests not to use the Sterling dry cleaning service, should be dismissed absent withdrawal.  
[FOIA Exemption 5

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and towels that are essential to the Hotel's basic operation.

<sup>24</sup> The fact that the Union had previously engaged in unlawful picketing activities at the same location does not make the picketing and handbilling of the dry-cleaning service unlawful. Here, the Union did not begin picketing the drycleaning service at the Hotel until about one to two weeks after it had ceased its unlawful picketing activities, and there was no continuation of the Union's prior unlawful activity at the time the picketing took place. See, e.g., IBEW Local 443 (Southern Sun Electric Corp.), 242 NLRB 1130 (1979)(new picketing should be determined good or bad for what it is and not by object or purpose of earlier picketing); Retail Clerks Local 1357 (Genuardi Supermarkets, Inc.), 252 NLRB 880, 887 (1980)(absence of a substantial hiatus between organizational/recognition picketing and picketing for other objectives was insufficient to demonstrate that the latter activity had an organizational/recognition objective).

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B.J.K.